

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 024263/2022

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

.....**17 April 2024**
SIGNATURE **DATE**

YVES SAUVOUR ACCOLLA

APPLICANT

and

TOMMASO SBORO

FIRST RESPONDENT

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

SECOND RESPONDENT

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 14h00 on 17 April 2024.

JUDGMENT

MBOWENI AJ

1. INTRODUCTION

1.1. This is an application for joinder of Nedbank and the Sherriff in the main application and the amendment of the Applicants Notice of Motion.

1.2. The issues to be determined by the Applicant according to the joint practice note is the following:

1.2.1. Whether the Applicant fails to set out a prima facie cause of action as against the Third and Fourth Respondents in order to obtain their joinder to the main proceedings.

1.2.2. Whether there was any non-compliance with uniform Rule 45 in respect of the sale in execution of Stojkovic's members interest;

1.2.3. Whether the Sheriff failed to comply with Section 34 of the Close Corporations Act.

1.2.4. Whether the Applicants claim in both the main proceedings and this interlocutory application is excipiable.

1.2.5. Whether the leave to amend and to file the supplementary affidavit should be granted.

1.2.6. Whether the Applicant delayed in seeking the alternative relief.

1.2.7. Costs

2. BACKGROUND

- 2.1. On or about 20 February 2018, the Writs of Execution and Notices of Attachment of the Stojkovic interest was served on the first respondent by the Sheriff Boksburg, as appears from the annexures "A5" and "A6", this was the first time that the first respondent became aware of the judgments taken by Nedbank against Stojkovic and their intention to sell the attached Stojkovic interest in execution of their judgements.
- 2.2. The first respondent then approached his attorneys of record, Jon Adam Creswick ("Creswick") and a meeting was arranged with the Applicant at the offices of the Applicants then attorneys of record, Strydom Attorneys which according to the first Respondent took place in March 2018.
- 2.3. The First Respondent stated in his answering affidavit that at this meeting it was agreed that in order to put paid to the sale in execution Creswick would approach Nedbank with an offer by himself and the applicant to purchase the Stojkovic interest in Euro in equal proportions for a purchase price of R400 000.00 (Four Hundred Thousand Rand) to be paid in equal shares by himself and the Applicant.
- 2.4. There is however no written record of this agreement between the parties.
- 2.5. The first respondent then approached Nedbank's attorneys with regard to the purchase and the attorneys undertook to revert to him in this regard but failed to do so and the sale in execution, of which the first respondent states that he was completely unaware of as the Notice of Sale in Execution, annexures B1 and B2 was apparently not served on him or on Euro, that took place at the Sheriff's Brakpan office on 04 May 2018, when the Stojkovic interest was

purchased by the applicant for an amount of R5 750.00 (Five Thousand Seven Hundred and Fifty Rand) inclusive of VAT.

2.6. On or about 04 May 2018, the Applicant purchased at the Sheriff's auction, all the members interest of Mladen Stojkovic, being 33.4% (thirty-three comma four percent, in Euro (the Stojkovic's interest)

2.7. The writs of execution (in respect of case numbers 45372/2013 and 7339/2013 were issued out of the Johannesburg High Court) dated 9 May 2017 was marked annexures "A1" and "A2" and was attached to the Applicants founding affidavit.

2.8. The following notices were attached :

2.8.1. The Sheriff's notices of judicial attachment (under case numbers as above), dated 20 July 2017 and marked "A3" and "A4".

2.8.2. The Sheriff's returns of service in respect of service of writs and notices of judicial attachment on the first respondent, marked "A5" and "A6".

2.8.3. The notices of sale in execution (in respect of the same case numbers as above) dated 09 and 10 April 2018 respectively and marked "B1" and "B2".

2.8.4. The Sheriff's certificate confirming the sale to the applicant, dated 04 May 2018, marked annexure "C".

2.8.5. Stojkovic's members interest was sold by the Sheriff to the Applicant for an amount of R5000.00 (excluding VAT).

2.9. On or about 08 June 2018, the applicants attorneys addressed a letter to the first respondent attorneys ("Creswick"), calling on the first respondent to sign the CK2 form necessary to register the applicants purchase of the Stojkovic interest.

2.10. The first respondent failed or refused to sign the CK2 form.

LEGAL FRAMEWORK

3. The First Respondents states that the case to be made out against the proposed new respondents is that the sale in execution was void on the alleged basis of:

3.1. Non-compliance with section 34 of the Close Corporations Act; or

3.2. Invalidity of the sale consequent upon alleged non-compliance with uniform rule 45(8)(c)(i)

4. It is common cause that at the time of the execution, there were three members of the close corporation, and it is not disputed that notice of the attachment was given in writing to all three existing members.

5. The applicant submits however that there ought to be a separate written notice of the attachment recording that it is given to the close corporation.

6. The respondent further argued that the rule does not provide for any particular method of notification. The only question is whether all interested parties were notified, in writing, of the attachment.

7. Section 34

Disposal of interest of insolvent member -

(1) Notwithstanding any provision to the contrary in any association agreement or other agreement between members, a trustee of the insolvent estate of a member of a corporation may, in the discharge of his or her duties, sell that member's interest—

(a) to the corporation, if there are one or more members other than the insolvent member;

(b) to the members of the corporation other than the insolvent member, in proportion to their members' interests or as they may otherwise agree upon; or

(c) subject to the provisions of subsection (2), to any other person who qualifies for membership of a corporation in terms of section 29.

(2) If the corporation concerned has one or more members other than the insolvent, the following provisions shall apply to a sale in terms of subsection (1)(e) of the insolvent member's interest—

(a) The trustee shall deliver to the corporation a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof;

(b) for a period of 28 days after the receipt by the corporation of the written statement the corporation or the members, in such proportions as they may agree upon, shall have the right, exercisable by written notice to the trustee, to be substituted as purchasers of the whole, and not a part only, of the insolvent member's interest at the price and on the terms set out in the trustee's written statement; and

(c) if the insolvent member's interest is not purchased in terms of paragraph (b), the sale referred to in the trustee's written statement shall become effective and be implemented.

8. Section 34A

"Notwithstanding any provision to the contrary in any association agreement or other agreement between the members, a trustee of the

insolvent estate of a member may, in the discharge of his duties, sell that members interest”.

9. **Section 35**

“Subject to any other arrangement in an association, an executor of the estate of a member of a corporation who is deceased shall in the performance of his or her duties”

Dispose of the members interests in accordance with subsections (a) and (b) of the Act.

10. Sub-section (c) also permits the sheriff to sell to a non-member, but in that event subject to the right of pre-emption in sub-section (2).

11. In terms of section 34, the sheriff is permitted to sell to the corporation, and is permitted to sell to the members of the corporation in proportion to their interests.

Applications- Supplementary Affidavits

12. The court has a discretion whether to permit the filing of further affidavits.¹

¹ See Rule 6(5)(e); See also **James Brown & Hamer (Pty)Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A)** at 660D.

13. No party can take it upon himself to file further affidavits without first having obtained leave of the Court to do so.² It has been held that where further affidavits are filed without the leave of the court, the court can regard such affidavits as *pro non scripto*.³
14. Leave to file a further affidavit must first be obtained from the court before it may be accepted, filed and thereafter considered, which must occur separately and not *pari passu*.
15. It is only in exceptional circumstances that further affidavits will be received. The position in this court was set out by Justice Raulinga as follows:
“The filing of further affidavits is an indulgence, and a basis must be laid for such indulgence to be granted. There is a well-established principle that there are normally three sets of affidavits in motion proceedings: the founding affidavit, answering affidavit and replying affidavit. In the absence of an explanation as to why the information included in the fourth set of affidavits could not have been included in the answering affidavit, the indulgence must be dismissed...”⁴
16. In each case, there should be a proper and satisfactory explanation, which navigates mala fides or culpable remiss, as to why the facts or information had not been put before the court at an earlier stage.⁵

² See *Hano Trading CC v JR 209 Investments (Pty)Ltd* 2013 (1) SA 161 (SCA) AT 165 A-C.

³ See *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at [13].

⁴ See *M&G Media Ltd v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) at [27].

⁵ See *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604A-E.

17. In ***Kasiyamhuru v Minister of Home Affairs and Others***⁶, the Witwatersrand Local Division, as it then was, had to decide whether to accept a fourth set of affidavits from the respondents. Having considered the evidence sought to be introduced by the respondents, Hoffman AJ stated the following:

18. As I have said, there were no reasons presented before me as to why the information now sought to be introduced was not put into the answering affidavits. It clearly was at all times available to the respondents.

19. The applicants alleged no exceptional circumstances that would entitle them to file further supplementary affidavits. No exceptional circumstances have been alleged to show that something unexpected or new has emerged.

20. The supplementary affidavit evidently seeks to introduce a new course of action.

Joinder of Parties and Causes of Action:

21. Rule 10 of the Uniform Rules of Court provides for the Joinder of parties and causes of action. The Supreme Court of Appeal set out the test for non-joinder in ***ABSA Bank Limited v Naude N.O***⁷, in the following terms:

“[10] The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgement of the court.”

⁶ 1999 (1) SA 643 (W) at 650D.

⁷ 20264/14 [2015] ZASCA 97 (1 June 2015).

A mere financial interest is an indirect interest and may not require joinder of a person having such an interest.

The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined.

22. In **Judicial Service Commission and Another v Cape Bar Council and Another**, the court held that:

*“[12] It has now become settled in law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be effected prejudicially by the judgement of the Court in the proceedings concerned (see *Bowring N.O v Vrededorp Properties CC 2007 (5) SA 239 (SCA)*, para [21]. The mere fact that the party may have an interest in the outcome of the litigation does not warrant a joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.*”

Amendments to Pleadings and Documents:

23. Rule 28 of the Uniform Rules of Court makes provision for the amendment of pleadings and documents.

24. Subrule 1 states that:

- (1) *Any party desiring to amend any pleading or document other than a sworn statement ,filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.*
- (2) *The notice in referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.*
- (3) *An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.*

25. Rule 45 (8) (c) of the Uniform Rules of Court states that:

- (c) *In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,*
 - (i) *the attachment shall only be complete when-*
 - (a) *notice of the attachment has been given in writing by the Sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property ,notice shall have been given to the registrar of deeds in whose deeds registry the property or right is registered ,and*
 - (b) *the Sheriff shall have taken possession of the writing or document*

evidencing the ownership of such property or right ,or shall have certified that he has been unable ,despite diligent search ,to obtain possession of the writing or document;

(ii) the Sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist ,enter upon the premises where such a property is and make an inventory and valuation of the right attached.”

EXCEPTION

26. An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon⁸.

27. “An exception is a legal objection to the opponents pleading .It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true ,it asserts that even with such admission the pleading does not disclose either a cause of action or a defence ,as the case may be .It follows that where an exception is taken ,the court must look at the pleading excepted to as it stands...”⁹

⁸ Herbstein and Van Winsen – The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5th Ed,2009 Chapter 22 – p630

⁹ Erasmus supra D1-295.

28. An exception provides a useful mechanism for weeding out cases, without legal merit. Be it as it may, an exception should still be dealt with in a sensible and not over technical manner¹⁰.

29. Thus, an exception founded upon the contention that the summons discloses no cause of action, or that the plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial. If it does not have that effect the exception should not be entertained.

30. The second or alternate leg in exceptions is where the excipient contends that the impugned pleading as it stands, is vague and embarrassing. The exception is intended to cover the case where, although a cause of action appears in the summons, there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendants. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.¹¹

31. The first respondent argued that in a joinder application it is necessary for the applicant to demonstrate that the proposed third and fourth respondents have a direct and substantial interest in the relief which the applicant intends pursuing.

¹⁰ Telematrix (Pty)Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H.

¹¹ Erasmus supra D1-301

32. If no cause of action is disclosed it follows as a matter of common sense that the proposed relief being excipiable, cannot be pursued against the proposed new respondents, and the joinder will be refused.

33. In order to understand why no cause of action is made out by the applicant against the third and fourth respondents, it is necessary to understand how it came about that the applicant decided that its necessary to amend the notice of motion in the original application to join the proposed new third and fourth respondents.

34. In the main application, the applicant sought an order that ,pursuant to the duly conducted sale in execution, the applicant was entitled to demand that the respondent transfer to him 50% of what he purchased at the sale in execution. In this regard the applicant relied on section 34 and 34A of the Close Corporations Act.

35. It was only after the heads of argument was filed in the main application that the joinder application then surfaced.

36. This was due to a misunderstanding of the effect of sections 34 and 34A of the Act that the claim was in fact excipiable.

37. When the applicant realized that his claim could be dismissed for want of establishing any cause of action, the applicant then now seeks to challenge the validity of the execution itself.

APPLICATION

38. The purpose of the rule is to inform all interested parties of the attachment. By informing each member of the close corporation, in writing, of the attachment, there can be no doubt that the close corporation was notified in writing.

39. I have to agree with the Respondent that there is no cause of action disclosed insofar as the application to amend and to join the third and fourth respondents which is premised on non-compliance with Rule 45(8).

40. The second challenge is indeed based on the assertion that the sale in execution is rendered invalid by the so-called non-compliance with section 34 of the Close Corporations Act.

41. In the case of a sale in execution to an existing member, there is nothing in section 34 which entitles remaining members to intercede in the sale in execution irrespective of whether they partake in the auction or not, let alone to force the successful purchaser, after the fact, to share in the purchase.

42. The respondent further alluded to the fact that the applicants existing cause of action, founded on section 34 requires a finding, as a matter of law, that the sheriff is obliged to sell the members interests, attached in execution, to the members of the corporation in proportion to their members interests, as stipulated in section 34(1) (b) of the Act.

43. The respondent argues that section 34 does not override the execution process.

44. Accordingly, the cause of action to sustain the relief concerned with setting aside the actual sale in execution has no legal foundation.

45. Based on the abovementioned rules and caselaw the Applicant has failed to set out a prima facie cause of action as against the Third and Fourth Respondents in order to obtain their joinder to the main proceedings.

46. It is my considered view that there was compliance with uniform Rule 45 in respect of the sale in execution of Stojkovic's members' interest.

47. Further to the above, the Sheriff did comply with Section 34 of the Close Corporations Act.

48. The Applicants claim in both the main proceedings and this interlocutory application is excipiable.

49. It is therefore my considered view that leave to amend and to file the supplementary affidavit should not be granted.

50. The Applicant delayed in seeking the alternative relief.

Order:

51. The application for the amendment and the joinder is dismissed with costs, including the cost of senior counsel.

L J MBOWENI
ACTING JUDGE OF THE HIGH COURT,
PRETORIA , NORTH GAUTENG

Date of Hearing: 06 February 2024

Date of Judgment: 17 April 2024

Appearances:

For the Applicant: Adv R.J Boucher

Instructed by Martini Patlansky Attorneys

For the First Respondent: Adv C Welgemoed

Instructed by: Cox Yeats Attorneys

